

ATTACHMENT

2.A.1.C. FHWA POSITION PAPER - SECTION 4(F) APPLICABILITY FOR TEMPORARY OCCUPANCY



U.S. Department
of Transportation
**Federal Highway
Administration**

Memorandum

Subject: Position Paper - Section 4(f) Applicability
Temporary Occupancy

Date: November 4, 1988

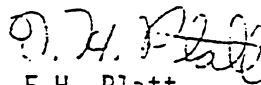
From: Harold J. Brown
Division Administrator
Albany, New York

Reply to
Attn. of: HW-NY

To: Director, Environmental Analysis Bureau
New York State Department of Transportation
Albany, New York

Attached is a copy of our Region One's Position Paper which sets forth the conditions to be met in making a determination of the applicability of Section 4(f) for the temporary occupancy of a Section 4(f) property required by or for a Federal-aid project. This position is consistent with the definition of Section 4(f) "use" as given in the FHWA Headquarters' Section 4(f) Policy Paper dated September 24, 1987. The concepts contained in this position have also been used in other Regions of FHWA.

This Position Paper should be of value for those projects which require temporary occupancy for such activities as wetland impact mitigation in public parks or wildlife refuges, historic impact mitigation, and the blending of project features with an adjacent 4(f) property. Usually these activities are developed in coordination with the officials having jurisdiction over the property and are often desired by them. If such occupancy can be determined not to be a Section 4(f) use, then a "prudent and feasible alternative" test for that occupancy is not needed.


F.H. Platt
District Engineer

Attachment

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Region One Position Paper
Section 4(f) Applicability
Temporary Occupancy

Section 303 of 49 USC states in part that the Secretary of Transportation may approve a transportation program or project requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge, or of an historic site only if there is no prudent and feasible alternative to using that land, and if all possible measures to minimize harm are included. FHWA Headquarters' Section 4(f) Policy Paper dated September 24, 1987 contains a definition of what constitutes a Section 4(f) "use". It states:

A "use" occurs (1) when land from a Section 4(f) site is acquired for a transportation project, (2) when there is an occupancy of land that is adverse in terms of the statute's preservationist purposes, or (3) when the proximity impacts of the transportation project on the Section 4(f) site, without acquisition of land, are so great that the purposes for which the Section 4(f) site exists are substantially impaired (normally referred to by courts as a constructive use).

When there is a temporary occupancy of a Section 4(f) property required by a Federal-aid project, part (2) of this definition is used to determine if in fact there is a "use" of that property within the meaning of the Section 4(f) statutes and if a Section 4(f) Determination is required. This office has determined that when all of the following conditions are met with regard to a temporary occupancy or easement, a Section 4(f) use does not occur and a Section 4(f) Determination is not needed.

Conditions

1. The occupancy, which may result in permanent change, is temporary in duration. No permanent easements (including maintenance easements) or land will be acquired or transferred. The duration of the temporary occupancy to be allowed will be the minimum reasonably possible (such as one or two construction seasons) and will be defined in the project documents.
2. The occupancy and/or resulting changes will not be adverse, either temporarily or permanently, to the function or intended purpose of the property or activity of the Section 4(f) site. The function or purpose is as defined by the officials having jurisdiction.
3. The FHWA Division and/or SHA must coordinate with the Federal, State, and/or local officials having jurisdiction over the property. Such officials must state in writing as to the acceptability of this occupancy and to the validity of Condition 2 above.
4. This proposed temporary occupancy will be addressed and evaluated in the project's environmental document to be approved by FHWA and will be subject to the public availability required for those environmental documents.